Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

STEPHEN ARTHUR HOUSTON,

Petitioner,

v.

ERNEST C. ROE, WARDEN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should Certiorari be granted to settle the meaning of Section 2254(d)(1) on which there is disagreement among the circuits, and to determine whether that statute works a suspension of the writ of habeas corpus in violation of Article I, section 9, clause 2?

2. Should Certiorari be granted to establish that this Court's Eighth Amendment and due process rules requiring specificity in state criminal laws and adequate distinction between capital and non-capital crimes apply whether or not the accused is sentenced to death?

3. Did the prosecutor's argument under the instructions to the jury impermissibly shift the burden of proof on the timing element to the defendant?

4. Did the unlimited flight instruction violated due process?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Authorities iii

Opinion Below 1

Jurisdiction 1

Statutes and Constitutional Provisions Involved 1

How the Federal Questions Were Raised and Decided Below 2

Summary of Argument 5

Reasons for Granting the Writ 6

1. Certiorari should be granted to settle the meaning of Section 2254(d)(1) on which there is disagreement among the circuits, and to determine whether that statute works a suspension of the writ of habeas corpus in violation of Article I, section 9, clause 2. 6

2. Certiorari should be granted to establish that this Court's Eighth Amendment and due process rules requiring specificity in state criminal laws and adequate distinction between capital and non-capital crimes apply whether or not the accused is sentenced to death. 13

3. The prosecutor's argument under the instructions to the jury impermissibly shifted the burden of proof on the timing element to the defendant. 23

4. The unlimited flight instruction violated due process. 27

Conclusion 30

TABLE OF AUTHORITIES

Page(s)

CASES:

Beck v. *Alabama*, 447 U.S. 625 (1980) 16

Bocian v. *Godinez*, 101 F.3d 465 (7th Cir. 1996) 7

Boyde v. *California*, 494 U.S. 370, 108 L.Ed.2d 316, 110 S.Ct. 1190 (1990) 24

Bragdon v. *Warden*, NO. 96 Civ. 1840, 1998 WL 846783 (D.Conn) Nov. 18, 1998 7

Clements v. *Fashing*, 457 U.S. 957 (1982) 22

Devlin v. *DeTella*, 101 F.3d 1206 (7th Cir. 1996) 9

Francis v. *Frankin*, 471 U.S. 307, 85 L.Ed.2d 344, 105 S.Ct. 1965 (1985) 25

Godfrey v. *Georgia*, 446 U.S. 420, 64 L.Ed.2d 398, 100 S.Ct. 1759 (1980) 14, 17

Harmelin v. *Michigan*, 501 U.S. 957 ..... 4, 14, 18, 19

Kolander v. *Lawson*, 461, U.S. 352, 75 L.Ed.2d 903, 103 S.Ct. 1855 (1983) 21, 22

Leary v. *United States*, 395 U.S. 6, 23 L.Ed.2d 57, 89 S.Ct. 1532 (1969) 8, 9, 30

Lindh v. *Murphy*, 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997) 9. 10

Martinez-Villareal v. *Stewart*, 118 F.3d 628 (9th Cir. 1997) 11

Mata v. *Johnson*, 99 F.3d 1261 (5th Cir. 1996) 7

Matteo v. *Superintendent*, 171 F.3d 877 (3rd Cir. 1999) ... 7

Table of Authorities continued

Page(s)

Moore v. *Calderon*, 108 F.3d 261 (9th Cir. 1997) 7

O'Brien v. *Dubois*, 145 F.3d 16 (1st Cir. 1998) 6, 7

People v. *Oler*, 15 Cal.App.3d 508 (1971) 28

People v. *Pensinger*, 52 Cal.3d 1210 (1991) 28

Sandstrom v. *Montana*, 442 U.S. 510, 61 L.Ed.2d 39, 99 S.Ct. 2450 (1979) 25

Shad v. *Arizona*, 501 U.S. — , 115 L.Ed.2d 555 (1991) . . 16

Smith v. *Goguen*, 415 U.S. 566, 39 L.Ed.2d, 605, 94 S.Ct. 1242 (1974) 14, 17, 21 22

Sumner v. *Shuman*, 483 U.S. 66 (1987) 20

Swain v. *Pressley*, 430 U.S. 372 (1997) 11, 13, 17

Tot v. *United States*, 319 U.S. 463, 87 L.Ed. 1519, 63 S.Ct. 1241 (1943) 9, 30

Ulster County Court v. *Allen*, 442 U.S. 140, 60 L.Ed.2d 777, 99 S.Ct. 2213 (1979) 8, 9, 30

United States v. *Harriss*, 347 U.S. 612, 98 L.Ed. 989, 74 S.Ct. 808 (1954) 21

United States v. *Hogg*, 670 F.2d 1358 (4th Cir. 1982) 9

United States v. *Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968) 20

United States v. *Myers*, 550 F.2d 1036 (5th Cir. 1977) 9

Vickers v. *Ricketts*, 798 F.2d 369 (9th Cir. 1986) 16

Wainwright v. *Stone*, 414 U.S. 21, 38 L.Ed.2d 179, 94 S.Ct. 190 (1973) 21

Table of Authorities continued

Page(s)

Yates v. *Aiken*, 484 U.S. 211, 98 L.Ed.2d 546, 108 S.Ct. 534 (1988) 25

Zant v. *Stephens*, 462 U.S. 862, 77 L.Ed.2d 235, 103 S.Ct. 2733 (1983) 14, 18

MISCELLANEOUS:

United States Code:

Title 28

Section 2241 . . . . . 10, 12
Section 2254 . . . . . 1, 3, 27
Section 2254(b) 10
Section 2254(c) 10
Section 2254(d)(1) . . . . . *passim*
Section 2264(a) 10

California Penal Code:

Section 190.2(a)(15) 19

United States Constitution:

Article I, Section 9, Clause 2 . . . . . 1, 5, 6, 11, 13

California Pattern Jury Instructions:

CALJIC 2.52 . . . . . 2, 8, 28, 30

CALJIC 8.25 . . . . . 5, 15, 18, 19

CALJIC 8.81.15 . . . . . 15, 17, 19, 23, 26

PETITION FOR WRIT OF CERTIORARI

Petitioner, STEPHEN ARTHUR HOUSTON, respectfully prays that a writ of certiorari issue to review the judgment and memorandum of the United States Court of Appeals, Ninth Circuit, affirming the district court denial of his petition for writ of habeas corpus, filed pursuant to Title 28 U.S.C. 2254.

OPINION BELOW

The opinion of the circuit court is reproduced in the Appendix at pp. App. 1-15, and published under the name *Houston v. Roe*, 177 F.3d 901. A facsimile of the order of the circuit court denying petitioner's timely petition for rehearing is also appended. (App. 16.)

JURISDICTION

Jurisdiction of the Court is invoked pursuant to 28 U.S.C. Sec. 1254(1). The judgment of the district court was rendered on December 12, 1997 and entered on December 16, 1997. The opinion of the circuit court was filed on February 1, 1999. A petition for rehearing and suggestion for rehearing *en banc* was timely filed, and the order denying the petition for rehearing and rejecting the suggestion for rehearing *en banc* was filed on September 17, 1999.

This Petition is timely filed pursuant to Rule 13.4 of the Supreme Court rules.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This petition involves Section 2254(d) of Title 28 of the United States Code, and constitutional provisions relating to the interpretation of that statute, including Article I, § 9, clause 2 of the United States Constitution and the due process clause and Amendment Eight.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

By Information Petitioner was charged in California State Court with murder of his wife. He was tried and convicted of special circumstances murder committed *while* lying in wait. California's death penalty law submits "special circumstance" allegations to the guilt phase jury. If the jury finds the defendant guilty of the special circumstance, state law permits only two possible punishments: death or life without the possibility of parole ("LWOP"). Here, although the state initially sought the death penalty, prior to the penalty phase trial, it agreed not to seek death and Petitioner was sentenced to life without parole.

The guilt phase of the case was tried twice. There was no question that Petitioner shot and killed his wife after they argued. She left and Petitioner armed himself and followed her. He found her in the company of a male co-worker and shot and killed her as she walked out the front door of the premises. The trial surrounded the degree of the homicide. The prosecution claimed the crime was first degree murder under state law committed by means of lying in wait, and further that the crime was capital murder (or special circumstance murder) committed "while lying in wait." The defense contended that there was no lying in wait at all and that the crime was committed in a heat of passion when Petitioner saw his wife with another man. In the first trial, which ended in a hung jury, evidence of prior fights and alleged assaults by Petitioner of his wife were excluded, but they were admitted in the re-trial which resulted in Petitioner's conviction. In addition, the jury was instructed without limitation that flight was a factor which could show guilt. This instruction was based on the fact that Petitioner left the scene of the shooting but the jury was not advised that flight was relevant only to the identity of the killer (which

was undisputed), rather than generally admissible on the question of guilt, including the degree of guilt.

The state pattern jury instructions used to inform the jury of the elements of first degree murder by means of lying in wait and special circumstance murder while lying in wait failed to make any meaningful difference between the two levels of crime. In argument, the prosecutor advised the jury that unless there is a significant interruption between the lying in wait and the killing, then the crime is both first degree murder and special circumstances. In fact, generally, throughout the case, both the prosecution and the trial court failed to distinguish between ordinary first degree murder by means of lying in wait and capital murder while lying in wait. Some state law cases have held that the distinguishing factor between first degree and capital murder in this context is the presence or absence of a significant interruption between the watchful waiting conduct and the killing. If there is no significant interruption, the more serious crime -- special circumstances murder *while* lying in wait is shown -- if there is such an interruption[1], the crime is first degree murder by means of lying in wait.

As this case involves no issues of exhaustion, procedural default, or federal jurisdiction, a detailed recitation of the state appellate proceedings is omitted. Petitioner appealed his conviction through the state courts and after affirmance, petitioned for habeas corpus relief, first in the state courts and then in federal courts pursuant to 28 USC 2254. This is a post-AEDPA case.

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[1] And the other elements required for both levels of murder -- watchful waiting (the statutory substitute for other proof of malice aforethought and deliberation and premeditation) and a killing in which the victim is taken unaware -- are present.

Insofar as they are relevant here, the issues raised in the federal habeas corpus petition were: (a) the failure of the state to adequately distinguish between ordinary first degree murder by means of lying in wait and special circumstances murder while lying in wait violated the Eighth Amendment and due process; (b) The "flight" instruction (CALJIC 2.52, 1979 Rev.) given to the jury deprived petitioner of a fair trial on the critical question whether the crime involved was a first degree murder committed by means of lying in wait, and/or was a special circumstance murder while lying in wait; (c) Petitioner was deprived of adequate assistance of counsel at the trial ("IAC") in violation of the Sixth Amendment right to counsel.

The district court denied the petition on the merits, finding that the jury instruction on flight did not raise a federal constitutional question; the prosecutor's argument did not shift the burden or proof, and the jury instructions on lying in wait did not violate the Eighth Amendment, or due process. Because the IAC claim was dependent upon one or more of the other claims, it was rejected as well.

On appeal, the circuit court rendered a published opinion which, to counsel's knowledge is one of first impression on several important questions, under AEDPA, and for federal habeas corpus by state prisoners, generally. Those issues include: (a) whether or not *Harmelin v. Michigan*, 501 U.S. 957 (1991) precludes a state prisoner sentenced to life without parole under a state death penalty statute from invoking constitutional infirmities in the state law under Eighth Amendment principles; (b) whether a state prisoner serving life without parole under an unconstitutional state death penalty law has "standing" to allege the unconstitutionality of that law; (c) whether Section 2254(d), restricting grounds for a state prisoner to obtain federal habeas corpus relief to issue which have been "clearly

determined" by this Court constitutes a suspension of the writ under Article I, §9, clause 2 of the Constitution (and the meaning of that requirement); (d) California's pattern jury instruction on first degree murder by means of lying in wait, (CALJIC 8.25) given here, is erroneous because it fails to distinguish between this form of (first degree) murder and special circumstance murder while lying in wait, which can be punished only by death or life without parole, but that the erroneous instruction actually *benefited* the defendant, despite the fact he was convicted of capital murder under instructions which did not distinguish between capital murder and non-capital first degree murder, which would have rendered him eligible for parole after 27 years.

SUMMARY OF ARGUMENT

Petitioner urges this Court to grant Certiorari and to determine if 28 USC Section 2254(d)(1) should be interpreted to preclude federal habeas review of any issue not clearly established as violative of the United States Constitution by the prior decisions of this Court and whether, assuming that interpretation is correct (as the court below ruled it was), whether the statute amounts to an unconstitutional suspension of the writ of habeas corpus under Article I, sec. 9, cl. 2 of the Constitution (the court below ruled it did not). The petition presents other constitutional issues, all of which the circuit court erroneously held were not violative of "clearly established" constitutional law under its impermissibly narrow interpretation of section 2254(d)(1). Specifically, the circuit court erroneously held that even though the jury instructions utterly failed to make any factual distinction between capital murder and non-capital first degree murder, there was no Eighth Amendment violation because Petitioner was sentenced to life without parole (LWOP), and because the distinction require the state to prove the elements of capital

murder for both crimes, which the circuit court inexplicably found "benefitted" Petitioner. Finally, certiorari is sought to clarify when a state law jury instruction violates the due process clause if it allows a jury to find guilt based on a factor which does not support an inference of guilt. Here although the only issue for the jury to decide was the degree or level of culpability of the defendant who did not contest that he committed homicide, the jury was allowed to use the fact he fled as evidence not only of his identity as the killer, and as evidence that he was able to think clearly enough (at least) to run away, but also as proof of his guilt of special circumstance murder rather than a less culpable form of criminal homicide.

REASONS FOR GRANTING THE WRIT

1. Certiorari should be granted to settle the meaning of Section 2254(d)(1) on which there is disagreement among the circuits, and to determine whether that statute works a suspension of the writ of habeas corpus in violation of Article I, section 9, clause 2.

Certiorari should be granted to settle whether: (a) Congress intended by means of section 2254(d)(1) to restrict the right to a federal habeas corpus so narrowly as the Ninth Circuit has held it did; and (b) if that narrow reading, was intended by Congress, whether Congress has thereby suspended the writ in violation of Article I, sec. 9, cl. 2 of the United States Constitution.[2]

In *O'Brien v. Dubois*, 145 F.3d 16, 24-25 (1st Cir.1998) the first circuit has held that to obtain relief under section 2254(d)(1), petitioners "must show that Supreme Court

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[2] This issue was clearly raised and decided by the ninth circuit in its decision below. (App. 5)

precedent requires an outcome contrary to that reached by the relevant state court."

The seventh has held that this means that lower federal courts may no longer overturn a state court decision based on their own jurisprudence (*Bocian v. Godinez*, 101 F.3d 465, 471 (7th Cir.1996). The level of generality of the statement of the rule of a decision of this court has become determinative not only of the merits of a habeas issue, but of the right to habeas review of that constitutional claim in the first place.

The outcome of a habeas petition under Section 2254(d)(1) becomes a game of circuit court roulette.

The seventh circuit has interpreted § 2254(d)(1) to mean that in the absence of a Supreme Court ruling, the "claim cannot be 'contrary to' or 'an unreasonable application of' a case that does not exist," and therefore the claim cannot be used to grant the habeas petition. *Bocian*, 101 F.3d at 472. Some other courts, including at times the ninth circuit[3] have interpreted the statute less strictly and, in the absence of a Supreme Court ruling on point, reviewed the state court decision for an "unreasonable application of [general] Supreme Court precedent." *Matteo v. Superintendent*, 171 F.3d 877, 889 (3rd Cir.1999) (internal quotations omitted); see *O'Brien*, 145 F.3d at 25; *Mata v. Johnson*, 99 F.3d 1261, 1268 (5th Cir.1996); *Bragdon v. Warden*, No. 96 Civ. 1840, 1998 WL 846738 (D.Conn. Nov. 18, 1998).

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[3] Previously, the ninth circuit ruled, (citing *Bocian*) that a writ may issue only when the state court decision is contrary to, or involved an "unreasonable application" of, an authoritative decision of this Court. *Moore v. Calderon*, 108 F.3d 261, 264 (9th Cir.1997). This "unreasonable application" language becomes illusory resulting in the suspension of the writ under the ninth circuit's application of its interpretation of the statute in the present case.

In the present case, the ninth circuit appears to have given lip service to the idea that a general constitutional principle found in a decision of this Court can require a federal court to grant a state prisoner habeas relief, while actually applying a far more restrictive rule. Thus in rejecting Petitioner's argument that the flight instruction given here violated due process by suggesting to the jury that Petitioner's guilt of "murder while lying in wait" rather than "murder by means of lying in wait" might turn in part on the fact that he fled after the shooting, the Court below held:

> "Houston fails to point to any 'clearly established federal law as determined by the Supreme Court' that prohibits giving a flight instruction when the defendant admits committing the act charged. Consequently, this issue is inappropriate for § 2254 review." (App. 15)

This statement virtually ignored the argument Petitioner made in his briefs on the point, which included citation to several cases decided by this Court which establish a general due process rule that supported his claim, and several circuit court decisions which held similar instructions violated due process.

For example, Petitioner argued:

> "In the present case, there was no rational way the jury could draw or support an inference of guilt *of murder* or *lying in wait*[4] from the fact of the flight. Therefore, the giving of CALJIC No. 2.52 permitting this inference is violative of substantive due process. (Please see *Ulster County Court* v. *Allen*, 442 U.S. 140, 157, 165, [60 L.Ed.2d 777, 797, 99 S.Ct. 2213 (1979)]; *Leary* v. *United States*, 395 U.S. 6, 36 [23 L.Ed.2d 57, 81-82, 89

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[4] As opposed to a less culpable form of criminal homicide, such as, e.g., voluntary manslaughter, or second degree murder.

S.Ct. 1532 (1969)]; *Tot* v. *United States*, 319 U.S. 463, 467 [87 L.Ed. 1519, 1524, 63 S.Ct. 1241] (1943).)"

In addition, Petitioner cited *United States* v. *Myers*, 550 F.2d 1036, 1049 (5th Cir. 1977) ["[E]vidence that the defendant fled the scene of a crime is admissible to demonstrate consciousness of guilt [when the] consciousness of guilt concerns the crime charged ..."] and *United States* v. *Hogg*, 670 F.2d 1358, 1363-4 (4th Cir. 1982) [same]) holding an instruction which permits an inference of guilt from a fact that does not support the inference violates due process, and applying the rule to a flight instruction where flight does not show guilt of the particular crime charged.

Petitioner was denied any fair chance to argue his federal due process point on the flight instruction issue because the ninth circuit has ruled that he may not do so on federal habeas because this court had never held a flight instruction to violate due process even though this Court has ruled that a permissive presumption instruction not supported by logic violates due process (in *Ulster, Leary, and Tot, supra.*)

In the circuit court the state argued that this Court had already narrowed the standard for federal habeas review in its earlier decision in *Lindh* v. *Murphy* 521 U.S. 320, 117 S.Ct. 2059, 2067 n. 7, 138 L.Ed.2d 481 (1997), cited for the proposition that Section 2254(d) as rewritten by AEDPA is a "new, highly deferential standard for evaluating state court rulings."

The state relied primarily upon seventh circuit decisions for authority on precisely how deferential and how narrow that review is. *Devlin* v. *DeTella*, 101 F.3d 1206, 1208 (7th Cir. 1996), was cited by Respondent for the proposition that Section 2254(d) eliminated the power of the federal Courts of Appeal to "rely on their own jurisprudence" in deciding habeas claims by state prisoners.

But this Court has never held that "federal courts are no longer permitted to apply their own jurisprudence but must look exclusively to Supreme Court caselaw" as Respondent claimed below and as the ninth circuit now appears to have held.

Nor did Congress either say or intend that to be the rule in adopting AEDPA. Such an interpretation of Section 2254(d) would be both unfair and unworkable in the extreme.

While federal constitutional jurisprudence has always been *governed* by this Court's precedents, Respondent's argument would mean the circuit courts could not apply a precedent from this Court in a factually different context in a section 2254 case, because that would require the circuit to "apply its own jurisprudence."

Also, contrary to the argument of the state below, it is beyond dispute that the "standard for evaluating state court rulings" was not the issue in footnote 7 of this Court's *Lindh* v. *Murphy* opinion. Nor was it the holding of *Lindh* (which held, generally, that AEDPA does not apply to habeas petitions pending before it was effective). Footnote 7 was a discussion of whether or not § 2264(a) replaces or compliments §§ 2254(b) and (c), an issue not presented in this case. Read in its entirety, it is clear that the "new standard" language in footnote 7 is neither necessary to the point made, nor particularly supported or discussed.

Suspension of the Writ (Art. I, sec. 9, cl.2)

There is no reason to believe Congress intended to suspend the writ of habeas corpus in all cases where a fundamental violation of the federal constitution has been shown, but the particular type of error has never explicitly been before the this Court.

Would Congress have intended that a state prisoner's constitutional claim must be denied *unless* the identical issue had previously been successfully pressed in this Court?

It appears that this interpretation of AEDPA would render it unconstitutional, in violation of Article I, sec. 9, cl. 2 of the United States Constitution because it would, in effect, mean that even where a state prisoner's detention is clearly unconstitutional, and even where his federal claim is properly preserved, fully exhausted and adequately pled and proven, he would not have a habeas corpus writ available to him to test the legality of his detention unless the constitutional argument he raised had previously been the holding of a decision of this Court.

> "The Suspension Clause provides that `[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.' U.S. Const., Art. I, S 9, cl. 2." *Martinez-Villareal* v. *Stewart*, 118 F.3d 628, 631 (9th Cir. 1997).

In *Swain* v. *Pressley*, 430 U.S. 372, 97 S.Ct. 1224, 51 L.Ed.2d 411 (1977) this Court stated that the test for determining whether or not a statute (or statutory interpretation) violated this clause depended upon whether or not the petitioner was left without remedy that is adequate and effective.[5] "[A] collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus." *Id.*, at 430 U.S. 382.

Interpreted as the Court below interprets it, the federal right to habeas corpus is available only to persons who raise

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[5] *Swain* was a pre-AEDPA case challenging Section 2255 as a substitute for the writ of habeas corpus. The Court held it was effective and adequate.

issues this Court happens to have considered in the past. This would mean that if a petition were filed before this Court considered whether the Sixth Amendment included a right to counsel, despite the fact that the Sixth Amendment itself clearly states it does include that right, no habeas corpus would be available in the lower federal courts on the ground that the right to counsel was denied.

A more modern example might be more plausible. If a person were convicted of sedition under a state law based on the expression of his unpopular political ideas in an internet published article, would he be able to obtain collateral relief under Section 2254 if no opinion of this Court had held the First Amendment applied to the internet? Respondent's argument leads to the conclusion that the rights of a person under the United States Constitution to a writ of habeas corpus depend not on whether the constitution has been violated, but upon whether or not the error has been the subject of a U.S. Supreme Court decision. There is no constitutional authority to suspend the right of habeas corpus on this basis, and interpreted as the ninth circuit has interpreted and applied it in this case, Section 2254(d)(1) is unconstitutional because it results in the suspension of the writ.

This Court is urged to grant certiorari in this case to determine that in fact section 2254(d)(1) does not suspend the writ because it permits state habeas petitioners to obtain federal relief whenever the United States Constitution has been violated in the state court, rather then only in those instances where the same issue they are raising has been the subject of a prior favorable constitutionally-based holding of this Court. Such a restriction is too narrow to survive the suspension clause, and Petitioner was either denied an "adequate and effective" opportunity to present his due process and other constitutional claims, or he was erroneously

denied relief on them. Since the circuit court either erred in interpreting Section 2254(d)(1), or that interpretation renders the statute unconstitutional under Section 9, clause 2 of Article I, the judgment of the circuit court must be reversed.

Faced with the suspension of the writ argument, the ninth circuit ruled the writ was not suspended because Section 2254(d)(1) "only requires that the Supreme Court clearly determine the law. See Davis v. Kramer, 167 F.3d 494, 498 (9th Cir.1999), petition for cert. filed, 67 U.S.L.W. 3570 (U.S. Mar. 8, 1999) (No. 98-1427)." (App. 5)

With this citation, the circuit court appears almost to be daring this Court to grant certiorari in the present case. Surely the writ *is indeed* suspended if a state prisoner who has suffered a conviction which violates the federal constitution in a way that is clear on the face of the constitution, but in an area in which this Court has not yet "clearly determined the law," may not obtain relief from that unconstitutional restraint. He or she has no adequate or effective way to vindicate the federal constitutional issue. (*Swain* v. *Pressley*, *supra*, 430 U.S. 372, 382). Indeed, he or she had no way to do so at all.

This Court is urged to establish the rule that Section 2254(d)(1) cannot constitutionally limit federal habeas relief to issues which have already been decided by this Court.

2. Certiorari should be granted to establish that this Court's Eighth Amendment and due process rules requiring specificity in state criminal laws and adequate distinction between capital and non-capital crimes apply whether or not the accused is sentenced to death.

The circuit court held, as Petitioner urged, that the jury instructions defining ordinary first degree murder did not adequately distinguish between that crime and capital murder,

because they defined the relationship between the homicide and the "lying in wait" in different words but with identical concepts.

Clearly the circuit court was correct that these instructions failed to distinguish between the two categories of crime, but remarkably the court held that this error did not violate any federal constitutional right of Petitioner and he was entitled to no relief.

The "well established" constitutional rules Petitioner relied upon were the Eighth Amendment rule that when a state law defines a capital crime (as the state law under which Petitioner was sentenced to LWOP here clearly does), it must include a distinct and additional element or elements making the capital offense more serious or culpable than ordinary non-capital murder. (Cf., *Godfrey* v. *Georgia*, 446 U.S. 420, 428 (1980); *Zant* v. *Stephens*, 462 U.S. 862, 877 (1983).)

In addition, Petitioner urged that ordinary due process even as it applies to non-capital cases requires that two different crimes, carrying different punishments, must have distinctly different elements. (Cf., *Smith* v. *Goguen*, 415 U.S. 566, 572-573 (1974)[6].)

The circuit court held that: (a) the Eighth Amendment does not apply to this case by reason of *Harmelin* v. *Michigan*, 501 U.S. 957, 1001; (b) due process is not offended because the state need only have some reason for its distinction between crimes, and absent Eighth Amendment

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[6] "[Due process] requires legislatures to set reasonable clear guidelines for . . . triers of fact in order to prevent `arbitrary and discriminatory enforcement.'"

scrutiny, no due process relief is available.[7] (App. 9-10); (c) these erroneous instructions *benefitted* Petitioner. (App. 11)

The opinion assumes the state proved the special circumstances crime, but ignored the fact that these instructions left the jury without a definition that distinguished from that offense the lesser included crime of ordinary first degree murder, which it might have convicted Petitioner of had it been properly instructed. The court below held:

> "Houston argues that the distinction between special circumstances murder while lying in wait and first degree murder by means of lying in wait was not explained in the jury instructions. We agree. The jury was instructed according to California Jury Instruction Criminal ("CALJIC") 8.81.15 that to find the special circumstance lying in wait "the killing must occur during the same time period, or in an uninterrupted attack commencing no later than the moment concealment ends." That instruction accurately reflects the temporal requirement for special circumstances murder while lying in wait. However, the jury was also instructed according to CALJIC 8.25 that first degree murder by means of lying in wait was "[m]urder which is immediately preceded by lying in wait." That instruction was erroneous. As explained above, first degree murder lying in wait does not contain a temporal requirement. Therefore, in order to be first degree murder by means of lying in wait, the killing did not need to be immediately preceded by lying

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[7] Apparently this is the conclusion of the circuit court, even though the jury was never told about the distinction which California law *says* it recognizes, because that distinction was not reflected in its pattern jury instructions in this case, as the circuit court went on to hold. (App. 10-11).

in wait. The killing could have come long after the lying in wait had ceased.

"Although the first degree murder instruction was erroneous, there is no clearly established federal law as determined by the Supreme Court that requires reversal in this case. In fact, the erroneous instruction actually benefitted Houston by increasing the government's burden. In order to prove first degree murder, the government had to perform the more difficult task of proving that the murder was immediately preceded by lying in wait. Requiring the government to satisfy the more stringent burden only helped Houston, which may explain why he did not object to this instruction until after he was convicted. Despite the erroneous instruction, the jury found that there was no clear interruption separating Houston's lying in wait and his act of shooting Johnson. That decision is supported by sufficient evidence introduced at trial. Because there is no clearly established federal law that requires reversal where state law provides a distinction between degrees of murder and an erroneous jury instruction blurs that distinction by increasing the burden on the government, the district court properly denied Houston's petition." App. 10-11.

This ruling overlooked the "clearly established" rule of this Court's decision in *Beck* v. *Alabama,* 447 U.S. 625 (1980), acknowledged in dicta in *Shad* v. *Arizona*, 501 U.S. -, 115 L.Ed.2d 555 (1991), and even recognized by the ninth circuit itself in *Vickers* v. *Ricketts* 798 F.2d 369 (9th Cir. 1986), that failure to give lesser included instructions is per se reversible where the instructions leave the jury only with the choice of convicting or acquitting the defendant. Here if they found the necessary temporal element they could only convict of the more serious crime, but if they did not find it,

there was no step down offense for them to return a guilty verdict on. This error, acknowledged by the circuit court, certainly *was* a violation of a "clearly established" due process rule, albeit a variation on the facts of the cited cases from this Court.

The circuit court's application of its own, restrictive rule interpreting away federal power to correct even this error it found to be present in the instructions on the elements of the crime(s) charged, shows without question that its narrow reading of Section 2254(d)(1) has rendered the right of habeas corpus suspended in this case. It has left Petitioner no "adequate or effective" way to vindicate the federal constitutional issues he raised. (*Swain* v. *Pressley*, *supra*, 430 U.S. 372, 382).

State law must provide "specific and detailed guidance" to the sentencing body when defining capital crimes. (*Godfrey* v. *Georgia*, 446 U.S. 420, 428, 64 L.Ed.2d 398, 100 S.Ct. 1759 (1980).

Due process also requires strict standards and definitions where a capital crime is involved. In *Smith* v. *Goguen*, 415 U.S. 566, 572-573, 39 L.Ed.2d 605, 94 S.Ct. 1242 (1974) the Supreme Court wrote that due process "requires legislatures to set reasonable clear guidelines for . . . triers of fact in order to prevent `arbitrary and discriminatory enforcement.'"

At the time of the trial in this case, the pattern jury instruction, CALJIC 8.81.15 advised the jury to convict if it finds the killing occurred "during the same period" as the watchful waiting, or "in an uninterrupted attack."

The approved state pattern jury instruction, CALJIC 8.81.15, went on to require that the killing must "commence no later than the moment the concealment ends." But this is no different from the instruction given to the jury to define first degree murder by means of lying in wait, which focused

on the requirement that to convict, the killing must be "immediately preceded" by watchful waiting. The circuit court found that this was the case and that the two crimes as defined in the instructions contained the same elements.

The special circumstance definition "commence no later than the moment concealment ends" is merely the literal reverse of the "immediately preceded by" requirement for first degree murder found in CALJIC 8.25, and conclusively establishes that there is no meaningful distinction between the two.

Under the instruction given, there is no meaningful distinction between capital murder and non-capital murder and the definitions of the two crimes (one rendering the defendant death-eligible, the other defining ordinary first degree murder) fails the constitutional tests set forth above.

The circuit court cited *Harmelin* v. *Michigan*, 501 U.S. 957, 1001 as authority for the conclusion that because Petitioner was not sentenced to death, he cannot raise the Eighth Amendment objection that he was prosecuted under definitions of a death penalty statute which definitions violate the requirements of *Zant v. Stephens*, and the other cases cited above. This Court is urged to grant certiorari and rule that where, as here, a defendant is prosecuted under a state death penalty law, but capital murder is defined as identical to the non-capital lesser first degree murder, he is entitled to relief for the violation.

Harmelin, however, deals with a question which is far easier than the one before this Court. For in that case the defendant complained that he was given a mandatory life without parole sentence (LWOP), without the benefit of the "individualized" sentencing or assessment of the aggravating and mitigating factors. This Court held the Eighth Amendment was not offended.

These aspects of the Eighth Amendment bear no relevance to the issue raised by Petitioner here -- the Eighth Amendment requirement that before a particular crime may be punishable by death, it must be somehow distinguished, by a specific element or characteristic, which makes it identifiably different than, and worse than, lesser crimes not punishable by death.

In this case Petitioner was charged with special circumstances murder under California's death penalty law which provides for either death or LWOP as the only possible sentences for special circumstances murder while lying in wait. (Penal Code Section 190.2(a)(15).)

To meet the above mentioned Eight Amendment requirement, the state has proffered a temporal element -- the need for the murder to follow, without any substantial interruption -- the lying in wait (i.e., "watchful waiting"). (CALJIC 8.81.15).

Under the instructions given here, however, this is no different from the temporal element in ordinary first degree murder by means of lying in wait, which requires that the killing must be "immediately preceded by" the lying in wait (i.e., the "watchful waiting). (CALJIC 8.25).

Obviously, if the identical problem (lack of any meaningful distinction) exists as to the definition of the crime which is death eligible, whether or not the death or LWOP sentence is imposed, the issue is fundamentally different from the Eighth Amendment arguments rejected in *Harmelin*.

Here, it is not that either LWOP or death is too severe a punishment for the crime of murder while lying in wait. Rather, it is simply that the California statute that allows the death sentence for that crime, as defined under California case law (which is the same of ordinary first degree murder

by lying in wait), violates the Eighth Amendment because it makes the defendant in such a case death eligible.

It is not the LWOP sentence in this case that violated the Eight Amendment, but the statute under which the LWOP sentence was imposed which violates it.

When the issue is viewed in this manner, it is clearly more like the argument accepted by this Court in *United States* v. *Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968) which held a federal kidnaping statute was unconstitutional because it allowed imposition of the death penalty solely by means of a jury verdict. See also *Sumner* v. *Shuman*, 483 U.S. 66, 107 S.Ct. 2716, 2728, 97 L.Ed.2d 56 (1987) (defendant sentenced under an unconstitutional state death penalty statute was entitled to resentencing).

Essentially, here, Petitioner was sentenced to LWOP under an unconstitutional death penalty statute, and his sentence of LWOP cannot, therefore, stand.

The argument of the trial prosecutor in this case added to the confusion between murder *by means of* lying in wait, and murder *while* lying in wait.

She stated first degree (non-capital) murder by means of lying in wait was: a "murder immediately preceded by lying in wait . . . the person was waiting and watching for an opportunity to act. That they acted from concealment or ambush. There while they were in this position they had premeditated and deliberated about what they were going to do."

Regarding the difference between "by means of" (non-capital) and "while" (capital) lying-in-wait, the prosecutor told the jury that if the defendant watched and waited but took the victim to another location and killed her it would still be "by means of" but that to be "while," the flow of events had to be uninterrupted, between the watchful waiting

and the killing. As this is a distinction without a difference, it fails the Eighth Amendment and due process tests and entitled Petitioner to federal review and habeas relief.

Even if this Court concurs with the ninth circuit that Petitioner cannot raise the Eighth Amendment violation because he was not sentenced to death, he is still entitled to federal relief because the due process clause also requires specific element identification sufficient to distinguish one crime from the other. This means of convicting and punishing defendant violated due process because there is no reasonable and clear guideline which prevented an arbitrary and discriminatory enforcement of the special circumstance lying in wait law. (See e.g., *Smith* v. *Goguen*, *supra*, 415 U.S. at p. 572-573; *United States* v. *Harriss* (1954) 347 U.S. 612, 617, 98 L.Ed. 989, 74 S.Ct. 808; *Wainwright* v. *Stone* (1973) 414 U.S. 21, 22, 38 L.Ed.2d 179, 94 S.Ct. 190.[8]

Special circumstances lying in wait murder was not defined with sufficient definiteness that ordinary people can understand what conduct *beyond that required for* ordinary first degree lying in wait murder constitutes the offense.. This failure to adequately distinguish between the two types of lying in wait murder encourages, and at least permits, arbitrary and discriminatory enforcement of the law of murder in California.[9]

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[8] "As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolander* v. *Lawson* (1983) 461 U.S. 352, 357-358, 75 L.Ed.2d 903, 909, 103 S.Ct. 1855.

[9] This Court recognized this type of danger in such a statute:
"`When the Legislature fails to provide such guidelines, the mere existence of a criminal statute may permit `"a standardless sweep"' that allows police officers, prosecutors, and juries `"to

Put in its simplest form, the state of California has articulated, and can articulate no reason for treating those charged with special circumstances murder while lying in wait, differently, or more severely than it treats ordinary first degree murder by means of lying in wait defendants. The reason it cannot articulate any grounds to justify the difference in treatment is that the state's definitions of the two classifications (at least as given to the jury in this case) makes no meaningful distinction -- any person who fits into one category, also fits into the other. This constitutes the absence of the required "rational relationship to a legitimate state end" upon which the state relies. (citing *Clements* v. *Fashing*, 457 U.S. 957, 963 (1982). Since "no grounds can be conceived to justify" the difference in treatment, due process *is* offended.

If, as is clearly the case, the state can distinguish in its treatment to this degree (between life, LWOP, or death) without any difference whatsoever, no rational relationship could exist between the statute and a legitimate interest for in truth the state has no legitimate interest, whatsoever in sentencing two people who have committed the same crime (or two different crimes with identical elements) to constitutionally significantly different sentences.

California could never justify sentencing a man who kills with "no substantial interruption" between watchful waiting and the killing death or LWOP, but only giving a man convicted of a killing "immediately preceding by" watchful waiting 25 years to life? If the difference between life with and life without parole is constitutionally significant, then the failure to meaningfully distinguish between a crime

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pursue their personal predilections.'" (*Kolander* v. *Lawson*, *supra*, 461 U.S. at p. 358 [75 L.Ed.2d at pp. 909-910], quoting *Smith* v. *Goguen* (1973) 415 U.S. 566, 575 [39 L.Ed.2d 605, 613, 94 S.Ct. 1242.

punishable with 25 to life and one punishable with death or LWOP violates both due process and equal protection.

The constitutional defects in the state's definition of these two crimes, and given to the jury in the instructions entitle Petitioner to a writ of habeas corpus under existing federal constitutional law. (Cf. 28 U.S.C. §2254(d).)

3. The prosecutor's argument under the instructions to the jury impermissibly shifted the burden of proof on the timing element to the defendant.

The jury instruction defining special circumstances murder while lying in wait given to the jury stated, in effect, that the special circumstance is present *unless* there is a "clear interruption" between the watching and waiting, and the murder. Neither this instruction [CALJIC 8.81.15 (1983 Rev.)] nor any other instruction explained to the jury that the People bore the burden of proving that this interruption was not present. The prosecutor argued to the jury that if the interruption was not established by the evidence, the murder was both murder by means of lying in wait (first degree), and murder while lying in wait (special circumstance).

The precise words of the instructions that are offensive are:

> "If there is a clear interruption separating the period of lying in wait from the period during which the killing takes place, so that there is neither an immediate killing nor a continuous flow of the uninterrupted lethal events, the special circumstance is not proved." (CALJIC 8.81.15 [Excerpt])

The clear impression a reasonable juror would gain from either CALJIC instruction 8.81.15 (1983 Rev.) or the prosecutor's argument that the murder was special circumstances murder while lying in wait unless there was a "clear interruption" was that the defendant had the burden of

proving that interruption or, at least, that the jury must find evidence of the interruption before they could find the special circumstance was not present.

This is clearly an unconstitutional shifting of the burden on an element of the crime or special circumstance. It required the jury to find the special circumstance to be true, *unless* it found the evidence showed a clear interruption.

This meant the prosecution would obtain a verdict that the special circumstance was true if the jury did not know whether or not there was a "clear interruption."

When this aspect of the instruction is combined with the fact that there was virtually no evidence presented regarding whether or not such a "clear interruption" between the alleged "watching and waiting" and the "murder" existed, the likelihood that the jury misunderstood it is manifest.

In *Boyde* v. *California*, 494 U.S. 370, 108 L.Ed.2d 316, 110 S.Ct. 1190 (1990), this Court held that if there is "a reasonable likelihood that the jury has applied the [prosecutor's argument or instruction] in a way that" misled the jury, the error violated the constitution. There, the Court established a uniform standard for evaluating an instruction which might have been unconstitutionally understood.

> "The claim is the instruction is ambiguous and therefore subject to an erroneous interpretation. We think the proper inquiry in such a case is whether there is a *reasonable likelihood* that the jury has applied the challenged jury instruction in a way that prevented the consideration of constitutionally relevant evidence." (110 S.Ct. at 1198-1199 [emphasis added])

The Court went on to explain that while the appellant need not show that the instruction was "more likely than not" to have had the improper impact on the verdict, a "mere possibility" would not require reversal.

In the present case there is virtual certainty that the jury did not understand that the People bore the burden of proving to them that there was no clear interruption between the watching and waiting and the murder, rather than the other way around -- that the murder was a special circumstance murder *unless* they found a clear interruption to be present.

For, as the prosecutor told them:

> "Having decided that the defendant is guilty of first degree murder you then say whether he was guilty because he premeditated and deliberated about the killing before he got there or because you believed that he waited and watched. You then have to decide was there an uninterrupted action in this waiting and watching?"

She went on to say that the interruption is present if you watch and wait, but then take your victim somewhere else to kill them. Obviously, there was no evidence the victim was moved before being killed in the present case, so the jury would naturally conclude the defendant was guilty based on a *lack* of evidence of an interruption.

In the circumstances of this case, then, the jury instructions, taken in the context of the record and the arguments of counsel, misled the jury into presuming the murder was special circumstance murder while lying in wait, unless the evidence convinced them a clear interruption preceded it, and separated it from the watching and waiting.

But this type of burden-shifting presumption is precisely the type of instruction this Court has held violates the due process clause. (Cf., *Sandstrom* v. *Montana*, 442 U.S. 510, 61 L.Ed.2d 39, 99 S.Ct. 2450 (1979); *Francis* v. *Franklin*, 471 U.S. 307, 85 L.Ed.2d 344, 105 S.Ct. 1965 (1985) and applied (on habeas corpus) in *Yates* v. *Aiken*, 484 U.S. 211, 98 L.Ed.2d 546, 108 S.Ct. 534 (1988).)

Clearly, here, looking at the instructions in light of "the whole record," including the prosecutor's argument,[10] it must be concluded that there is a reasonable likelihood that the jury understood the instructions in a way that relieved the prosecution of the burden of proving that the defendant actually killed after watching and waiting *without an appreciable interruption.*

There is a grave doubt whether the jury would have understood CALJIC 8.81.15 to require the state to prove the negative element -- the absence of a substantial interruption between the watchful waiting and the killing -- or think the killing was presumed to be lying in wait unless the evidence showed such an interruption, as the prosecutor argued.

The instruction was ambiguous because it discussed the concept of "a clear interruption" as though it was a fact the jury could find or not find.[11] But that phrasing suggests that *unless* the jury did find an interruption, the crime was lying in wait murder. In other words, unlike the elements of the special circumstance, which the other instructions told the jury the prosecutor must prove beyond a reasonable doubt, the issue of a "clear interruption" was something that had to be *disproved* in order to negate the special circumstance. The

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[10] On the difference between "by means of" and "while" the prosecutor told the jury that if the defendant watched and waited but took the victim to another location and killed her it would still be "by means of" but that to be "while," the flow of events had to be uninterrupted, between the watchful waiting and the killing.* * * "If you find there was no interruption between the waiting and watching and the time Donna was killed, then you find the special circumstances true." * * * "The word `while' means an uninterrupted flow of the events."

[11] CALJIC 8.81.15 told the jury:
"If there is a clear interruption... the special circumstance is not proved."

jury was never told that the prosecutor bore the burden of proving there was no such clear interruption.

Where, as here, the burden is on the prosecution to prove a negative -- i.e., the absence of a substantial interruption, that fact should be clearly set out in the instructions, which it was not. If the jury thought, as the instruction and argument clearly implied, that lying in wait is shown unless there is a substantial interruption, it is reasonably probable that the jury placed the burden of proving the presence of such an interruption on the defendant.

There is grave doubt that the jury placed a burden on the prosecution to prove the absence of such an interruption, because the jury instructions did not require it, and because the natural interpretation of all the instructions is that the jury is to look at the evidence and determine if an interruption is shown.

For these reasons, the Court is urged to conclude the instruction and argument regarding the element of special circumstances lying in wait requiring the absence of an interruption violated defendant's federal due process rights, and impermissibly shifted the burden of proof on that element. Since this violated well established federal constitutional principles, the court below erred in affirming the denial of his petition under section 2254.

4. The unlimited flight instruction violated due process.

There was NO ISSUE in this case about the identity of the defendant as the shooter, nor was there any question that he had engaged in a criminal act in shooting and killing his wife. Where, as here, the defendant does not deny guilt and the jury is only going to determine the degree or level of criminal homicide he committed, an instruction which permits the jury to conclude he is "guilty" based on his flight without other limitation violates due process.

The purpose of the flight instruction is to allow the jury to infer from the fact that the defendant fled, either that he is the person that committed the crime charged, or that he knew what he did was wrong.[12]

But in this case neither knowledge nor identity were the issue. The issues presented were: (a) did the evidence establish malice; (b) did the evidence establish a first degree (rather than lower degree) murder; and (c) did the evidence establish a special circumstance murder *while* lying in wait?

The instruction itself, however, does nothing to limit its application to an inference of a guilty mind flowing from the fact of flight, to support an inference either of identity or knowledge.[13] Rather, the instruction allows the jury to conclude that flight is evidence of *legal guilt* of the crime charged.

As given to the jury in this case, CALJIC 2.52 reads:

> "The flight of a person immediately after the commission of a crime, or after [he] [she] is accused of a crime, is not sufficient in itself to establish [his] [her] guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding the question of [his] [her] guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine." (App. p. 20, CALJIC 2.52.)

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[12] *People* v. *Pensinger*, 52 Cal.3d 1210 (1991); *People* v. *Oler*, 15 Cal.App.3d 508 (1971). These and other state cases were cited below to show the circuit court how the flight instruction was supposed to be used in a California trial, not, as the opinion suggests, to urge state error on this federal habeas. (Cf. App. 15, n. 3.)

[13] Nor, as the circuit court suggested, was the instruction either offered to show, or limited to showing, defendant's presence of mind as evidenced by his flight to negate a mental deficiency defense.

The jury was simply told that flight is relevant to whether the defendant is guilty or not. A reasonable interpretation of this instruction is that if the defendant fled, that fact is relevant to prove he is guilty of special circumstances murder while lying in wait rather than a less culpable form of homicide. But the *only* inference that the law would actually allow from the fact of flight is an inference of the identity of the perpetrator -- i.e., the one who flees is the guilty party. No inference is permitted that one who flees is guilty of lying in wait murder, *rather than* second degree murder. There is no logical or experiential-based reason to conclude one who commits special circumstance murder is more likely to flee than one who commits second degree murder, or manslaughter.

In this case the defense did not contest that defendant was guilty *of something*. The problem with allowing the jury to use flight as evidence of guilt here is that consciousness of guilt is irrelevant to either the *degree* of the crime, or the existence or non-existence of malice or special circumstances. He admitted he intentionally shot his wife with a shotgun. Flight was clearly *irrelevant* to whether or not he lay in wait (which was contested) and whether or not the homicide followed immediately after or flow from such watchful waiting.

The fact that Petitioner fled tends to prove defendant was the shooter and tends to prove he did something he knew (or believed) was wrong. But the defense admitted that much. What flight does *not* prove is that the crime was committed with malice or that it was first degree or special circumstances murder rather than second degree murder.

In the present case, there was no rational way the jury could draw or support an inference of guilt *of murder* or *lying*

in wait[14] from the fact of the flight. Therefore, the giving of CALJIC No. 2.52 permitting this inference is violative of substantive due process. (Please see *Ulster County Court* v. *Allen*, 442 U.S. 140, 157, 165,(1979); *Leary* v. *United States*, 395 U.S. 6, 36(1969); *Tot* v. *United States*, 319 U.S. 463, 467 (1943).) This instruction, which violated substantive due process, was, also, clearly prejudicial, and denial of relief on the basis of this constitutional violation should be reversed.

Petitioner argued below that his counsel rendered ineffective assistance for failing to object to various errors discussed here. Should this Court grant the writ and find any such errors were indeed committed, remand to the circuit court to determine the merits of the IAC claim is requested. (See App. 17-18).

CONCLUSION

WHEREFORE, Petitioner prays that this Honorable Court grant this Petition and issue its Writ of Certiorari.

Respectfully submitted this 16th day of December, 1999.

WILLIAM J. KOPENY
Counsel of Record for Petitioner
Stephen Arthur Houston

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[14] As opposed to a less culpable form of criminal homicide, such as, e.g., voluntary manslaughter, or second degree murder.

APPENDIX

App. 1.

Stephen Arthur HOUSTON, Petitioner-Appellant,
v.
Ernest C. ROE, Warden, Respondent-Appellee.

No. 98-55251.

United States Court of Appeals,
Ninth Circuit

Argued and Submitted Feb. 1, 1999.

Filed June 8, 1999.

After his first-degree murder conviction was affirmed on appeal in state court, petitioner sought habeas corpus relief. The United States District Court for the Central District of California, William D. Keller, J., denied petition, and petitioner appealed. The Court of Appeals, Trott, Circuit Judge, held that: (1) Antiterrorism and Effective Death Penalty Act (AEDPA) does not effect an unconstitutional suspension of the writ of habeas corpus; (2) California Penal Code does not violate Eighth Amendment by imposing a sentence of life without possibility of parole (LWOP) without distinguishing factors that result in lesser punishment of life with parole (LWP); (3) petitioner lacked standing to argue that California law violated Eighth Amendment by establishing vague and arbitrary guidelines for death penalty; (4) meaningfully distinguishable line existed between first-degree murder by means of lying in wait and capital murder with the special circumstances of lying in wait, and, thus, California murder statute did not encourage arbitrary enforcement and was not unconstitutionally vague; (5) though first-degree murder instruction given in state court was erroneous, this did not provide basis for habeas relief; (6) jury instruction and closing argument on special circumstances lying in wait did not unconstitutionally shift burden of proving lack

of a time gap to the defense; and (7) habeas relief was not available on petitioner's claim that jury instruction on flight was erroneous, nor for his claim that state court erred in admitting prior bad acts evidence.

Affirmed.

William J. Kopeny, Kopeny & Powell, Irvine, California, for the petitioner-appellant.

Kenneth N. Sokoler, Deputy Attorney General, Los Angeles, California, for the respondent-appellee.

Appeal from the United States District Court for the Central District of California; William D. Keller, District Judge, Presiding. D.C. No. CV-97- 01421-WDK (RC).

Before: D.W. NELSON, KOZINSKI, and TROTT, Circuit Judges.

TROTT, Circuit Judge:

Steven Arthur Houston ("Houston") appeals the denial of his 28 U.S.C. § 2254 petition, alleging that his conviction for first degree murder is unconstitutional. We have jurisdiction pursuant to 28 U.S.C. § 2253 (1994), and we affirm.

BACKGROUND

On September 11, 1987, Houston was convicted by a jury of shooting and killing his wife Donna Johnson ("Johnson"). Houston hid outside Johnson's office with a shotgun he had purchased the day before, and when Johnson exited the building, he shot her. After the shooting, Houston fled briefly to another city, but was apprehended when he returned to his

home. At trial, Houston admitted to shooting his wife, but argued that he had acted in a fit of rage when he saw Johnson hug and kiss another man. The jury found Houston guilty of first degree murder, and he was sentenced to life in prison without the possibility of parole.

Houston's conviction was affirmed by the California Court of Appeal, and his petition for review to the California Supreme Court was denied. Subsequently, Houston filed a petition for habeas under 28 U.S.C. § 2254 (1994 & Supp. IV 1998). The district court denied that petition, and this appeal followed.

STANDARD OF REVIEW

We review de novo a district court's decision to grant or deny a § 2254 habeas petition. Eslaminia v. White, 136 F.3d 1234, 1236 (9th Cir.1998). Findings of fact relevant to the district court's decision are reviewed for clear error. Moran v. McDaniel, 80 F.3d 1261, 1268 (9th Cir.1996).

DISCUSSION

I. Scope of Review

Before addressing the merits of Houston's claim, we note the limited scope of our review. Because Houston filed this petition after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. No. 104-132, 110 Stat. 1214, the provisions of the Act apply to this petition. See Jeffries v. Wood, 114 F.3d 1484, 1495-96 (9th Cir.1997) (en banc); accord Lindh v. Murphy, 521 U.S. 320, 335-36, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997). As amended by the AEDPA, 28 U.S.C. § 2254(d) provides in relevant part that

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was

adjudicated on the merits in State court proceedings unless the adjudication of the claim–

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

In interpreting this section, we have predictably held that "[a] state court decision may not be overturned on habeas review, for example, because of a conflict with Ninth Circuit-based law, but rather a writ may issue only when the state court decision is "contrary to, or involved an unreasonable application of," an authoritative decision of the Supreme Court. Moore v. Calderon, 108 F.3d 261, 264 (9th Cir.1997) (quoting 28 U.S.C. § 2254(d)); see also Bocian v. Godinez, 101 F.3d 465, 471 (7th Cir.1996) ("Federal Courts are no longer permitted to apply their own jurisprudence, but must look exclusively to Supreme Court caselaw."). Because all claims presented by Houston in this petition were presented to the state court, we may only grant Houston's petition if his conviction is contrary to "clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d).

Houston argues that if the AEDPA is read this way, it constitutes a suspension of the writ of habeas corpus and therefore violates Article I, § 9, clause 2, of the Constitution. However, the AEDPA does not suspend the writ; it only requires well-established federal law, as determined by the Supreme Court, before a federal court can reverse a state court decision. Contrary to Houston's argument, the Supreme Court need not have addressed a factually identical case, § 2254(d) only requires that the Supreme Court clearly determine the law. See Davis v. Kramer, 167 F.3d 494, 498 (9th Cir.1999),

petition for cert. filed, 67 U.S.L.W. 3570 (U.S. Mar. 8, 1999) (No. 98-1427).

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II. Individual Sentencing Doctrine

Houston argues that the California Penal Code violates the Eighth Amendment by imposing a sentence of life without the possibility of parole ("LWOP") without distinguishing the factors that result in the lesser punishment of life with parole ("LWP").

The Eighth Amendment requires that state sentencing guidelines clearly distinguish between criminals sentenced to death and those not sentenced to death. Godfrey v. Georgia, 446 U.S. 420, 428, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). However, the Supreme Court has refused to extend this rule to require states to distinguish between criminals sentenced to LWOP and those sentenced to LWP. Harmelin v. Michigan, 501 U.S. 957, 995, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (plurality).[1] In Harmelin, the Court noted that "[i]n some cases ... there will be negligible difference between life without parole and other sentences of imprisonment-for example, a life sentence with eligibility for parole." Id. at 996. We therefore hold that the California Penal Code does not violate the Eighth Amendment by failing to extend the Godfrey doctrine to LWOP crimes.

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[1] Justice Kennedy's concurrence became the holding of the Court because it was the narrowest ground upon which five justices agreed. However, six justices concurred in part IV of Justice Scalia's opinion, which refused to extend the individualized sentencing doctrine to criminals sentenced to LWOP.

III. Arbitrary and Capricious Application of Death Penalty

Houston argues that the California Penal Code violates the Eighth Amendment by establishing vague and arbitrary guidelines for determining when the death penalty may be imposed. Houston specifically argues that the line between non-capital first degree murder by means of lying in wait and capital first degree murder with the special circumstance of lying in wait has become blurred and makes imposition of the death penalty vague and arbitrary.

The Eighth Amendment prohibits the death penalty from being "imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner." Godfrey v. Georgia, 446 U.S. 420, 428, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). "A capital sentencing scheme must ... provide a 'meaningful basis for distinguishing' " the few cases where it is imposed from the cases where it is not. Id. (quoting Gregg v. Georgia, 428 U.S. 153, 188, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)). States are therefore obligated to "define the crimes for which death may be the sentence in a way that obviates 'standardless [sentencing] discretion.' " Id. at 428 (quoting Gregg, 428 U.S. at 196 n. 7).

The government correctly argues that Houston lacks standing to bring this argument because he was not sentenced to death. Article III of the Constitution requires that parties challenging the death penalty on Eighth Amendment grounds have standing. Whitmore v. Arkansas, 495 U.S. 149, 161, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990). To meet the standing requirements of Article III, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." Allen v. Wright, 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). The injury must be distinct and palpable not

merely speculative, and the harm must be imminent and not hypothetical. Whitmore, 495 U.S. at 155.

In this case, the government did not seek the death penalty, and Houston was not sentenced to death. There is no risk that he will be arbitrarily sentenced to death in the future for killing Johnson. Houston therefore fails to allege an actual or threatened injury. Houston argues that he could have been sentenced to death for the crime he was convicted of and therefore has standing. However, "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." United States v. Raines, 362 U.S. 17, 21, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960).

IV. Vagueness

Houston argues that California Penal Code § 190.2(a)(15) is unconstitutionally vague. "As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). Houston argues that non-capital first degree murder by means of lying in wait is indistinguishable from capital first degree murder with the special circumstance of lying in wait and therefore encourages arbitrary and discriminatory enforcement.

In this case, the California legislature and courts have created a thin but meaningfully distinguishable line between first degree murder lying in wait and special circumstances lying in wait. See People v. Superior Court, 134 Cal.App.3d 893, 184

Cal.Rptr. 870, 872-73 (Cal.Ct.App.1982). First degree murder is statutorily defined as "murder which is perpetrated by means of ... lying in wait." Cal.Penal Code § 189. Special circumstance murder is statutorily defined as murder where the "defendant intentionally killed the victim while lying in wait." Cal.Penal Code § 190.2(15). The distinction is found in the terms "while" and "by means of." California courts read "while" to require that the lethal acts must begin at and flow continuously from the moment the concealment and watchful waiting ends. If a cognizable interruption separates the period of lying in wait from the period during which the killing takes place, the circumstances calling for the ultimate penalty do not exist. Domino v. Superior Court, 129 Cal.App.3d 1000, 181 Cal.Rptr. 486, 493 (Cal.Ct.App.1982). Unlike special circumstances murder while lying in wait, first degree murder by means of lying in wait does not contain a temporal requirement. See id. Because there is a distinction between first degree murder by means of lying in wait and capital murder with the special circumstances of lying in wait, California Penal Code § 190.2(a)(15) does not encourage arbitrary enforcement, and is not unconstitutionally vague.[2]

V. Jury Instructions

Houston argues that the distinction between special circumstances murder while lying in wait and first degree murder by means of lying in wait was not explained in the jury

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[2] For this reason we also reject Houston's arguments that California Penal Code § 190.2(a)(15) violates equal protection.
Justice Kennedy's concurrence became the holding of the Court because it was the narrowest ground upon which five justices agreed. However, six justices concurred in part IV of Justice Scalia's opinion, which refused to extend the individualized sentencing doctrine to criminals sentenced to LWOP.

instructions. We agree. The jury was instructed according to California Jury Instruction Criminal ("CALJIC") 8.81.15 that to find the special circumstance lying in wait "the killing must occur during the same time period, or in an uninterrupted attack commencing no later than the moment concealment ends." That instruction accurately reflects the temporal requirement for special circumstances murder while lying in wait. However, the jury was also instructed according to CALJIC 8.25 that first degree murder by means of lying in wait was "[m]urder which is immediately preceded by lying in wait." That instruction was erroneous. As explained above, first degree murder lying in wait does not contain a temporal requirement. Therefore, in order to be first degree murder by means of lying in wait, the killing did not need to be immediately preceded by lying in wait. The killing could have come long after the lying in wait had ceased.

Although the first degree murder instruction was erroneous, there is no clearly established federal law as determined by the Supreme Court that requires reversal in this case. In fact, the erroneous instruction actually benefitted Houston by increasing the government's burden. In order to prove first degree murder, the government had to perform the more difficult task of proving that the murder was immediately preceded by lying in wait. Requiring the government to satisfy the more stringent burden only helped Houston, which may explain why he did not object to this instruction until after he was convicted. Despite the erroneous instruction, the jury found that there was no clear interruption separating Houston's lying in wait and his act of shooting Johnson. That decision is supported by sufficient evidence introduced at trial. Because there is no clearly established federal law that requires reversal where state law provides a distinction between degrees of murder and an erroneous jury instruction blurs that distinction by increasing

the burden on the government, the district court properly denied Houston's petition.

VI. Burden of Proof

Houston argues that the district court's jury instruction on special circumstances lying in wait unconstitutionally shifted the burden of proving the lack of a time gap to the defense. In order to challenge a jury instruction on habeas, the defendant must prove that " 'the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.' " Estelle v. McGuire, 502 U.S. 62, 72, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) (quoting Cupp v. Naughten, 414 U.S. 141, 147, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973)). The instruction must be viewed in the context of the entire trial and the jury instructions taken as a whole. See id. The relevant inquiry is "'whether there is a reasonable likelihood that the jury has applied the challenged instruction' " in an unconstitutional manner. Id. (quoting Boyde v. California, 494 U.S. 370, 380, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990)).

It is beyond dispute that the government must prove every element of a crime beyond a reasonable doubt. Thus, a jury instruction that shifts the burden of proof on an element of the crime to the defendant violates due process. Sandstrom v. Montana, 442 U.S. 510, 523-24, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). In this case, the jury was instructed that

> [i]f there is a clear interruption separating the period of lying in wait from the period during which the killing takes place, so that there is neither an immediate killing nor a continuous flow of the uninterrupted lethal events, the special circumstance is not proved.

After reviewing the entire record, we agree with the well reasoned report and recommendation of Magistrate Judge Chapman that this instruction did not unconstitutionally shift the burden of proof. The instruction simply explains that under California law in order to constitute special circumstance lying in wait, the killing must follow immediately after the lying in wait. It does not relieve the government of its burden of proving that the killing immediately followed the lying in wait. Indeed, CALJIC 8.81.15 specifically states that in order to find the special circumstance of lying in wait, the fact that the murder was committed while the defendant was lying in wait "must be proved." Additionally, the instruction does not say that the defendant must prove the gap, it only says that if there was a gap, then the special circumstance was not proved.

Moreover, the court gave two other instructions that specifically provided that the special circumstance had to be proven by the government. In addition to those instructions, the jury was instructed that the government had to prove guilt beyond a reasonable doubt. Given these clear and repeated instructions, we hold that the jury was accurately instructed on the burden of proof.

Houston also argues that the prosecution unconstitutionally shifted the burden of proof in its closing argument. As with improper jury instructions, we look at alleged prosecutorial misrepresentations to determine whether the prosecutor's comments " 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986) (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)). However, "arguments of counsel generally carry less weight with a jury than do instructions from the court." Boyde, 494 U.S. at 384. Additionally, the Supreme Court instructs that "a court should

not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." Donnelly, 416 U.S. at 647.

In closing, the prosecutor argued as follows

> [w]hat is special circumstance while lying in wait? Having decided that the defendant is guilty of first degree murder you then say whether he was guilty because he premeditated and deliberated about the killing before he got there or because you believed that he waited and watched. You then have to decide was there an uninterrupted action in this waiting and watching. If you find that there was no interruption between the waiting and watching and the time Donna was killed, then you find the special circumstance true.

Viewing this statement in the context of the entire trial, we hold that the prosecutor did not act inappropriately. The prosecutor simply explained the law as it applied to the case and the steps the jury must go through in reaching its conclusion. The prosecutor did not suggest that Houston had the burden to prove there was a time gap in between the lying in wait and the killing. The prosecution only reasserted the explanation of the jury instruction that, if there was a gap in between the killing and the lying in wait, then special circumstances murder was not proven.

VII. Jury Instruction on Flight

Houston argues that the district court erred in instructing the jury that the flight of a person immediately after the commission of the crime is itself not enough to prove, but may be considered as evidence of guilt. Houston argues that because

the only issue was whether the killing was in the heat of passion or premeditated, the flight instruction was irrelevant and likely misinterpreted by the jury as permitting them to consider flight evidence of premeditation.[3] Houston fails to point to any "clearly established federal law as determined by the Supreme Court" that prohibits giving a flight instruction when the defendant admits committing the act charged. Consequently, this issue is inappropriate for § 2254 review.[4]

VIII. Prior Bad Acts

Houston argues that the state court erred in admitting evidence of four prior incidents between himself and Johnson as prior bad acts.[5] The bad acts all involve situations where Houston physically assaulted or chased Johnson. Houston does not argue that this violated clearly established federal law as determined by the Supreme Court and this issue is therefore inappropriate for § 2254 review.[6]

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[3] Houston cites numerous California cases and argues that this instruction was inappropriate under California law. That argument misunderstands the scope of federal habeas. Under federal habeas, we do not address violations of state law. Estelle, 502 U.S. at 67-68.

[4] Additionally, at trial, Houston claimed that he suffered from temporary lobe epilepsy which led to violent outbursts. The fact that Houston got in his car after he shot Johnson, and then fled is relevant to whether Houston was incapacitated when he shot Johnson. Therefore, admission of the flight instruction was not erroneous.

[5] Houston argues that admission of this evidence violated California law. Again we do not address violations of state law in federal habeas petitions. Estelle, 502 U.S. at 67-68.

[6] Moreover, admission of the prior bad acts seems to have been appropriate. We have held that admission of prior bad acts only violates due process if "there are no permissible inferences the jury may draw from

IX. Effective Assistance of Counsel

Finally, Houston argues that his Sixth Amendment right to effective assistance of counsel was violated by the incompetent performance of his trial counsel. In order to succeed on an ineffective assistance of counsel claim, Houston must prove that his counsel's performance fell below an objective standard of reasonableness and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Houston bases his ineffective assistance of counsel claim on his prior claims of error, arguing that his counsel's failure to object to the jury instructions, the prosecution's closing argument, and the admission of prior bad acts proves his counsel was ineffective. As explained above, except for Houston's attorney's failure to object to the erroneous jury instruction, the alleged errors simply were not errors. Because Houston does not satisfy the

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the evidence." Jammal v. Van de Kamp, 926 F.2d 918, 920 (9th Cir.1991); see also McKinney v. Rees, 993 F.2d 1378, 1384 (9th Cir.1993). In this case, the state court admitted the prior bad acts for the purpose of showing motive and intent. The prior bad acts showed that Johnson had resisted Houston and ran to the police in the past and therefore explains why Houston hid outside Johnson's office before killing her. Moreover, the state court correctly instructed the jury that the prior bad acts were not to be considered as evidence of guilt or predisposition. After the admission of each incident, the state court instructed the jury of the limited nature for which the testimony was being admitted. The state court also gave a jury instruction that limited consideration of the evidence to intent and motive.

requirements of Strickland, the district court correctly denied his ineffective assistance of counsel claim.

CONCLUSION

For the reasons stated herein, we affirm the denial of Houston's habeas corpus petition.

AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STEPHEN ARTHUR HOUSTON, Petitioner-Appellant, v. ERNEST C. ROE, Warden, Respondent-Appellee.	**[FILED SEP. 17, 1999]** No. 98-55251 D.C. No. CV-97-01421-WDK(RC) ORDER

Before: D.W. NELSON, KOZINSKI, and TROTT, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing. Judges Kozinski and Trott have voted to deny the petition for rehearing en banc, and Judge Nelson so recommends.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing, and the petition for rehearing en banc, are DENIED.